No. 129.

C. G. Burgoyne's Printing Business, 146-150 Centre

Reply Brf. of Smith & Co

Filed Nov. 29, 1897.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1897

UNITED STATES, appellant, v. PASSAVANT & CO.	No. 129.

Appellees' Notes of Reply.

The Solicitor-General having kindly favored us with a copy of his brief, received after ours was printed, it may assist the Court if we call attention to matters wherein we agree, and may define the issue more clearly to file some brief notes upon his argument.

It is a mistake (His brief, p. 4, middle) to say there was no attempt to review the decision of the collector as to the "*amount* of duties chargeable upon the imported merchandise."

Klingenberg's case italicizes the declaration that section 14 confers the right of judicial review of the collector's decision "as to *both* rate and amount of duties," as distinguished from each other. (153 U. S. 101 bottom.)

If the appraiser's mental operations cannot be investigated, his report resulting therefrom can be read, and its statements taken as the ground of his and of the collector's action.

Upon the fifth page of his brief, the Solicitor-General states the fact which our brief emphasizes, viz; That, under the tenth section, Act of June 10, 1890, "The appraiser ascertains the actual market value and wholesale price of the merchandise in the principal markets of the country whence imported." It is *only* this appraisement of *market*-value—*when conducted in conformity with law*—that is final, unless changed upon re-appraisement under Section 13.

In the present case the Board stated that the appraiser's returns indicated no increase, above the invoice, of the value of the goods *per se*, but only an addition for dutiable purposes, simply giving a construction to the invoice.

Section 13 makes the decision of the appraiser final, except upon reappraisement, only " in cases where no objection is made thereto " by either party. This section must contemplate either a *legal* objection to the conduct of the appraisal, or dissatisfaction with its judgment as matter of fact; all legal questions to be settled under section 14, and errors of fact under section 13.

At the commencement of the statute quoted upon page 6 of the government brief, the words " invoice and entry " are the nominatives of " include and specify." *These papers* are to state the actual cost of the goods, *per se*, and *also* the specified costs and charges. Such has been the requirement of previous statutes, whenever such items were dutiable. Ex gr., R. S. sec. 2907 and Gen. Regs. under the same; also oaths under R. S. sec. 2841. Moiety Act, sec. 14; 18 Stats. 189. Act of March 1, 1823; 3 Stats. 731. See 116 U. S. 507-8, and 513. In the act of 1883, some specification of charges, etc., were required, though non-dutiable under that act.

In the case there reported (116 U. S., 499) we emphasized the statement now here repeated; that Congress has never made " charges," etc., the subject of appraisement—" never, from July 4, 1789, to this day."

The market-value is appraised, as by Act of June 10, 1890, § 10; to which the items mentioned are added, to fix the amount upon which duty is assessed.

The whole course of legislation and practice, reviewed in our Oberteuffer brief, and which we have not time now again to produce here, shows the error of the Solicitor-General in contending (page 7) that "coverings," etc., are any part of the value of the merchandise, to be appraised. Many opinions of this Court speak of the value of the goods *per se*, the subject of appraisement, as distinguished from the dutiable value, which includes charges, etc.

The Solicitor-General's error is refuted by section 14, Act of 1890, which makes the Collector's decision as to "all dutiable costs and charges" the subject of judicial review upon protest.

We have no quarrel with the definition of actual market value upon page 7 of the government brief;—the issue here is as to the application of it. We say our invoice stated just that wholesale price at which the goods were freely offered to all purchasers at the time of exportation.

Section 19 observes the distinction always made from July 4, 1789 down. Section 10 relates to what shall be *appraised*—the *market* value. Sec. 19 relates to what shall be *assessed*—the *dutiable* value. And as this is a decision of the collector, it is made subject of protest, under sec. 14. The *appraiser* has no statutory duty to perform regarding *dutiable* value.

In our brief we have already considered the cases mentioned by the Solicitor General in the rest of the first division of his brief, pp. 11 to 14. Upon the last-named page, the brief says, "The German duty was not treated as a dutiable cost or charge; it could not be so treated, *for it was not paid*" (so italicized). "The market value was not ascertained, and the German duty added as a separate and independent charge."

We say it *was* so treated, though not paid. It was so "added." The record so states, at p. 2, fol. 3, item 10.

It also expressly negatives the idea of 'special advantages,' declaring the purchase we made was free to all the world, wishing to export.

Without again reviewing the government's citations we will say (1.) that the French drawback *was* paid, though refunded upon exportation, so that sum did actually attach to the goods, at one time, in France, while our German duty never did; and (2) that the Treasury Department does *not* now include the French drawback as an element of valuation, having voluntarily retired from that position.

As to the question of a market-value in bond, if these importers are mistaken so were Judges BLODGETT and COLT, and the Treas. Dept. that, for twenty years, acted in conformity with their decisions.

In reference to Judge WHEELER'S opinion, we say he states the exact fact, as shown by the record;—"The appraiser *added* the amount of that [German] duty to *the wholesale price* of the goods in that country, in ascertaining the *dutiable* value here". The Solicitor General thinks that *cannot* be, because that duty was never paid. That is just the ground of our complaint. Like the prisoner told he could not be incarcerated for doing a certain act, "Nevertheless that is what I am here for." We note Judge WHEELER'S suggestion that the enumeration of those charges incident to exportation as to be added, excludes all others—especially which were not so incident. *Expressio, etc.*

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